UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

GREGORY TYREE BROWN, Plaintiff, v. BERNARD WARNER, et al., Defendants.	NO: 2:13-CV-130-RMP ORDER ADOPTING IN PART AND REJECTING IN PART MAGISTRATE'S REPORT AND RECOMMENDATION

BEFORE THE COURT are the parties' objections to United States Magistrate Judge John T. Rodger's Report and Recommendation to Grant in Part and Deny in Part Defendants' Motion for Summary Judgment, ECF No. 65. Both parties have filed objections to the Report and Recommendation and responses to the objections of the opposing party. *See* ECF Nos. 137-141. The Court has reviewed the pleadings and is fully informed.

BACKGROUND

Plaintiff filed his Second Amended Complaint in this action on November 21, 2013, alleging violations of his rights under the First, Second, Eighth, Thirteenth, and Fourteenth Amendments after Defendants responded to an

altercation between Plaintiff and another inmate in prison. ECF No. 12. Defendants responded by moving for a dismissal of all of Plaintiff's claims, and all but two of the claims were dismissed. Plaintiff was allowed to proceed against Defendants Westfall, Shodahl, and Cluever for failure to protect in violation of the Eighth Amendment and against Shodahl and Cluever for use of excessive force in violation of the Eighth Amendment. *See* ECF No. 26. Defendants then moved for summary judgment regarding the two remaining claims. *See* ECF No. 45.

On July 6, 2015, Magistrate Judge John T. Rodgers drafted a Report and Recommendation that this Court grant in part and deny in part Defendants' Motion for Summary Judgment, ECF No. 45. *See* ECF No. 65. Specifically, the Magistrate Judge recommended that this Court grant summary judgment on Plaintiff's Eighth Amendment deliberate indifference claim against Westfall, Shodahl, and Cluever, but that Plaintiff should be permitted to proceed on his claims for relief against Shodahl and Cluever for use of excessive force in violation of the Eighth Amendment. *See* ECF No. 65.

This Court has conducted a de novo review of each section of the Magistrate Judge's Report and Recommendation, the parties' objections, the underlying motion for summary judgment, Plaintiff's response, and relevant evidence. This Court addresses each objection in turn.

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ANALYSIS

The moving party is entitled to summary judgment when there are no disputed issues of material fact when all inferences are resolved in favor of the non-moving party. *Northwest Motorcycle Ass'n v. United States Dep't of Agric.*, 18 F. 3d 1467, 1471 (9th Cir. 1994); Fed. R. Civ. P. 56(c). If the non-moving party lacks support for an essential element of their claim, the moving party is entitled to judgment as a matter of law regarding that claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323. Importantly, at the summary judgment stage, the Court does not weigh the evidence presented, but instead assumes its validity and determines whether it supports a necessary element of the claim. *Id*. In order to survive a motion for summary judgment once the moving party has met their burden, the non-moving party must demonstrate that there is probative evidence that would allow a reasonable jury to find in their favor. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 251, 106 S. Ct. 2505, 2511-12, 91 L. Ed. 2d 202 (1986). "A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact." *F.T.C. v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997), *as amended* (Apr. 11, 1997) (citing *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir.1993) and *United States v. One Parcel of Real Property*, 904 F.2d 487, 492 n. 3 (9th Cir.1990)).

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A. Defendants' objection regarding Plaintiff's claim of excessive force

There is no dispute over the fact that a violent fight broke out between Plaintiff and a fellow inmate and that the fight set into motion the facts giving rise to this suit. However, the Magistrate Judge found that there is an issue of material fact regarding the events surrounding the fight and the correctional officers' response to the violent disruption. *See* ECF No. 65. After Plaintiff was punched by another inmate and a fight ensued, Defendants responded to control the situation, but the parties' descriptions of how that response was carried out differ greatly.

Defendants claim that they applied minimal force to Plaintiff for less than a minute in order to restore order to a hostile situation, *See* ECF No. 45 at 10-14, but Plaintiff contends that they instead, "pounced on plaintiff's back with substantial amount of body weight, thereby causing pain, and choking, smothering, and preventing him from breathing." ECF No. 12 at 12. Plaintiff further alleges that when he stated that he could not breathe, Shodahl responded, "If you can talk, you can breathe." *Id*. Viewing the facts in the light most favorable to the non-moving party, the Plaintiff in this case, the Magistrate Judge found that there is an issue of material fact as to whether the response was excessive in violation of the Eighth Amendment. *See* ECF No. 65 at 9.

When dealing with inmates in a prison setting, only those inflictions of pain that are deemed "unnecessary and wanton" are sufficient to establish a violation of

the Eighth Amendment. *Whitley v. Albers*, 475 U.S. 312, 319, 106 S. Ct. 1078, 1084, 89 L. Ed. 2d 251 (1986) (citing *Ingraham v. Wright*, 430 U.S. 651, 670, 97 S.Ct. 1401, 1412, 51 L.Ed.2d 711 (1977)). As the Ninth Circuit discussed in *Clement v. Gomez*, 298 F.3d 898, 903 (9th Cir. 2002):

> When prison officials use excessive force against prisoners, they violate the inmates' Eighth Amendment right to be free from cruel and unusual punishment. Force does not amount to a constitutional violation in this respect if it is applied in a good faith effort to restore discipline and order and not "maliciously and sadistically for the very purpose of causing harm." *Whitley v. Albers*, 475 U.S. 312, 320–21, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986). This standard necessarily involves a more culpable mental state than that required for excessive force claims arising under the Fourth Amendment's unreasonable seizures restriction. *Graham* [*v. Connor*], 490 U.S. [386,] 398, 109 S.Ct. 1865 [, 104 L. Ed. 2d 443 (1989)]. For this reason, under the Eighth Amendment, we look for malicious and sadistic force, not merely objectively unreasonable force.

In reviewing officers' responses to a disturbance within a prison setting, courts are obligated to apply a heightened level of deference to the actions of correctional officers in light of the unique dangers they face. *See Whitley*, 475 U.S. at 320-21. Only a response that is carried out "maliciously and sadistically" and "for the very purpose of causing harm" will be found "unnecessary and wanton." *Id.* Additionally, the Supreme Court in *Whitley* held that, "[u]nless it appears that the evidence, viewed in the light most favorable to the plaintiff, will support a reliable inference of wantonness in the infliction of pain under the standard we have described, the case should not go to the jury." 475 U.S. at 322.

Defendants object to the Magistrate Judge's Recommendation to deny summary judgment regarding the excessive force claim because they assert that the claim is based entirely on the Plaintiff's unsupported and inadmissible declaratory statements. *See* ECF No. 68 at 7-12. Defendants argue that all of the admissible evidence in this case demonstrates that Defendants acted in a good faith attempt to preserve security and order in a prison setting following a violent event. *Id*.

This Court recognizes that Defendants were responding to a violent brawl between two inmates in prison, and therefore are entitled to the heightened level of deference that the Supreme Court applies in such situations. *See Whitley*, 475 U.S. at 320-21. Despite the alleged factual dispute over how quickly or exactly how the officers responded to the fight, the Court finds that there is no genuine issue of material fact regarding whether Defendants carried out their actions "maliciously and sadistically" and "for the very purpose of causing harm." Plaintiff's conclusory statements to the contrary are insufficient to overcome Defendants' Motion for Summary Judgment.

The Magistrate Judge found that "it is plausible the described restraint technique utilized by Defendants Shodahl and Cluever was administered to appropriately subdue an inmate who had been observed fighting with another inmate" and that "[i]t appears reasonable that Defendants Shodahl and Cluever believed both inmates were 'fighting' and in need of restraint, and there is no Eighth Amendment violation if force was applied in 'a good-faith effort to

maintain or restore discipline.'" ECF No. 65 at 8-9 (citing *Wilkins v. Gaddy*, 559 U.S. 34, 40, 130 S. Ct 1175, 1180, 175 L. Ed. 2d 995 (2010) and *Whitley*, 475 U.S. at 322-323). This Court agrees with the Magistrate Judge's statement, but disagrees with his resulting recommendation.

This Court applies the heightened standard announced in *Whitley* and finds that Defendants acted within their discretion to resolve a violent disruption in a prison setting. Despite Plaintiff presenting evidence contradicting Defendants' factual account regarding how long Plaintiff was held down or the manner in which he was handcuffed, Plaintiff has failed to provide any reliable evidence that would demonstrate that the officers acted "for the very purpose of causing harm" or that they did so "maliciously and sadistically." There is no reliable evidence that Defendants' actions were not motivated by a desire to end a violent brawl between two inmates. Due to the lack of such evidence, Defendants are entitled to summary judgment regarding Plaintiff's Eighth Amendment claim of excessive use of force.

It bears noting that the Magistrate Judge found a genuine issue of material fact regarding the malicious and sadistic nature of Defendants' actions in light of Plaintiff's account of what occurred. *See* ECF No. 65 at 9. This Court's de novo review of the video and photographic evidence submitted by Defendants largely corroborates the Defendants' factual account. *See* ECF Nos. 49-50. Plaintiff

objects to Defendants' assertions regarding how Defendants responded with confusing and contradictory assertions. *See generally* ECF No. 82.

For example, Plaintiff claims that the video evidence was manufactured and that he is not one of the inmates depicted as fighting, but then relies on that same video to demonstrate an alleged inconsistency in Defendants' story that Plaintiff was holding the other inmate's arm when they were punching each other.[1] *See* ECF No. 74 at 12-13. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 1776, 167 L. Ed. 2d 686 (2007). Plaintiff's bare and conclusory assertions that the video was manufactured and that Defendants acted in a malicious and sadistic nature, which is refuted by the video recording of the incident, are insufficient to create a genuine issue of material fact regarding this claim.

Alternatively, if this Court were to approve of the Magistrate Judge's Recommendation to allow the excessive force claim to proceed, this Court would be obligated to conduct a qualified immunity analysis. Prison officials carrying out their duties are immune from suit unless their behavior contravenes "clearly

[1] The truth of this statement is immaterial for purposes of the pending motion.

established federal law." *Torres v. City of Madera*, 648 F.3d 1119, 1127 (9th Cir. 2011). The doctrine of qualified immunity serves two important and, at times, competing interests: "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986). "It shields government officials performing discretionary functions from liability for civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." *Clement v. Gomez*, 298 F.3d 898, 902-03 (9th Cir. 2002).

Even if officials violate federal law, if they do so in an "objectively reasonably manner," they are not liable to personal suits for monetary damages. *See Macariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). Importantly, qualified immunity is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial" (emphasis in original). *Scott*, 550 U.S. at 376, 127 S. Ct. at 1774 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)). Accordingly, the Supreme Court has repeatedly "stressed the importance of resolving immunity questions at the earliest possible stage in

litigation." *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 536, 116 L. Ed. 2d 589 (1991).[2]

In determining whether the relevant law was "clearly established," this Court must look at the specific context of this case. *See Scott*, 550 U.S. at 377, *see also Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Viewing the facts in the light most favorable to Plaintiff and even accepting *arguendo* that he has established that his Eighth Amendment rights were violated, the Defendants' responses to a violent disturbance in prison cannot be deemed a violation of clearly established law. In light of the great deference granted to prison officials in such situations, this Court finds that even if Defendants put significant pressure on Plaintiff as they handcuffed him before taking him directly to the medical center, their reaction can only be seen as a reasonable interpretation of their obligations under the Eighth Amendment as they carried out their duties in the face of a significant risk of injury. This Court recognizes and applies what the Supreme Court applied in *Whitley*: "the appropriate hesitancy to critique in

[2] *See e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); *Davis v. Scherer*, 468 U.S. 183, 195, 104 S.Ct. 3012, 3019, 82 L.Ed.2d 139 (1984); *Mitchell*, 472 U.S. at 526; *Malley*, 475 U.S. at 341; *Anderson v. Creighton*, 483 U.S. at 646, n. 6, 107 S.Ct. 3034, 3042, n. 6, 97 L.Ed.2d 523 (1987)).

hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." 475 U.S. at 320. Therefore, in addition to the finding that Plaintiff's excessive force claim should be dismissed, the Court finds that Defendants have qualified immunity from suit for Plaintiff's excessive force claim.

Accordingly, in light of Defendants' objection, this Court denies the Magistrate Judge's Recommendation to deny summary judgment regarding Plaintiff's Eighth Amendment claim of excessive use of force.

B. Plaintiff's objection regarding claim of deliberate indifference

The Magistrate Report and Recommendation correctly stated that "the Eighth Amendment prohibits state actors from acting with deliberate indifference to an inmate's health or safety." ECF No. 65 at 3 (citing *Farmer v. Brennan*, 511 U.S. 825 (1994). An inmate claim based on deliberate indifference requires that Plaintiff demonstrate that he was "incarcerated under conditions posing a substantial risk of serious harm," and that Defendants acted with "deliberate indifference" to that risk. *See Farmer*, 511 U.S. at 834. Inmates' constitutional rights may be violated if officials fail to adequately protect them from harm inflicted by their fellow inmates. *See White v. Roper*, 901 F.2d 1501, 1403-1404 (9th Cir. 1990).

Plaintiff objects to the Magistrate Judge's Recommendation that this Court dismiss his Eighth Amendment claim for failure to protect. *See generally* ECF No.

74. His claim is premised on the unsupported assertion that prison officials have promulgated a policy requiring inmates who are assaulted "to lay still and do nothing to resist the assault," which he argues subjects him to "sadistic practices that pose a serious danger to all prisoners." ECF No. 74 at 1, 3. Plaintiff argues that Defendants demonstrated deliberate indifference to his being attacked by a fellow inmate, and he supports this claim by arguing that "a reasonable jury could find that Westfall's, Shodahl's, and Cluever's order to 'break it up' was an order that Brown lay still and allow Jones to pummel him, and such created an obvious danger that predictably led to Brown's injuries." *Id*. at 5.

This Court finds that Plaintiff's argument is baseless and that Defendants' order to "break it up" was a reasonable response to an ongoing fight that in no way could be interpreted to mean that one inmate should lie still while another inmate would be allowed to beat him. The order was directed at both inmates participating in the fight, and Defendants acted to enforce that order by taking physical action. Plaintiff's argument implies that this claim would not have arisen if Defendants let all fights continue endlessly while the fighting inmates be allowed to "defend" themselves; to the contrary, that course of action would be much more likely to result in a viable claim for deliberate indifference and failure to protect inmates.

Plaintiff also objected to the standard applied by the Magistrate Judge when he determined that Plaintiff had failed to show Defendants would have "reason to

believe inmate Jones would punch Plaintiff when Plaintiff released him in obedience to the 'break it up' order." ECF No. 74 at 6. Plaintiff cites *Farmer*, 511 U.S. at 842, to argue that Defendants did "not have to believe that harm will actually occur, as long as they have actual knowledge of the risk." ECF No. 74 at 6. Contrary to Plaintiff's assertions, the Magistrate Judge properly cited that same case, to properly apply the same standard, and this Court upholds the same result. Defendants acted reasonably in light of the risks of which they were aware.

In objecting to the Magistrate Judge's Recommendation to grant summary judgment regarding the deliberate indifference claim, Plaintiff raises numerous arguments regarding the evidence reviewed by the Magistrate Judge and that is now before this Court. *See* ECF No. 74 at 8-15. Although the substance of these objections is unclear, Plaintiff asserts that the Magistrate Judge improperly excluded his evidence based on immaterial inconsistencies and improperly adopted Defendants' factual account. *Id*. at 8-11. That is a mischaracterization of the Report and Recommendation as the Magistrate Judge properly considered evidence from both parties but properly evaluated the weight that should be afforded to differing factual accounts while viewing the evidence in the light most favorable to the Plaintiff. *See generally* ECF No. 65.

Without any supporting evidence, Plaintiff raises multiple allegations of dishonesty on the part of Defendants, including that they fabricated video evidence. *See* ECF No. 11-15. Although Plaintiff cites case law for what this

Court should do with fabricated evidence and dishonest testimony, there is no evidence that any of that applies to the present case, and Plaintiff fails to show any support for these claims. Having conducted a de novo review of the Magistrate Judge's determinations, this Court finds that there is no cause to sustain any of Plaintiff's evidentiary objections.

Finally, Plaintiff argues that Defendant Westfall should be found liable for his deliberate indifference in acquiescing and approving of the excessive force allegedly used by Defendants Shodahl and Cluever. *See* ECF No. 74 at 16-17. As addressed above, the actions taken by Defendants Shodahl and Cleuver did not constitute excessive force or violate Plaintiff's rights, so their supervisor cannot be held vicariously liable for nonexistent claims. Additionally, Plaintiff failed to cite any legal support for the claim that a prison official may be held liable for "failing to report risks" and "praising" the actions of other officers. *Id.*

In light of the foregoing considerations, this Court overrules Plaintiff's objections and adopts and approves of the Magistrate Judge's Recommendation to grant summary judgment regarding Plaintiff's Eighth Amendment claim for failure to protect.

Accordingly, **IT IS HEREBY ORDERED**:

1. The Report and Recommendation, **ECF No. 65**, is **ADOPTED IN PART** and **REJECTED IN PART**.

2. Defendant's Motion for Summary Judgment, **ECF No. 45**, is **GRANTED IN ITS ENTIRETY**.

The District Court Clerk is directed to enter this Order, enter Judgment accordingly, and provide copies to counsel and to pro se Plaintiff.

DATED this 16th day of November 2015.

s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
Chief United States District Court Judge